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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 106

WILLIAM LEIGHTON,
Petitioner,

v.

SECURITIES AND EXCHANGE COMMISSION,
Respondent.

PETITION FOR THE REHEARING OF THE ORDER OF OCTOBER 10, 1955 DENYING THE ISSUANCE OF A WRIT OF CERTIORARI, AND FOR A STAY OF PROCEEDINGS

WILLIAM LEIGHTON,
Petitioner *pro se,*
43 West 74th Street,
New York 23, N. Y.

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Additional Questions Presented

I. Whether Due Process of Law, such as is exclusively prescribed by the Administrative Procedure Act to proceedings before the Commission, has not been denied to petitioner by the Commission's failure (i) to act on a statutory complaint and (ii) to adjudicate an order thereon, and by the failure of the Court of Appeals to review the Commission's "agency action".

II. Whether the Faithful Execution of the Laws does not require the Commission to implement §20(a) of the Securities Act either by general rule or by individual decision, where, by statutory complaint, the doctrine of primary jurisdiction and administrative finality is complied with by the complainant, petitioner here.

III. In view of this Court's impending decision of *Corn Products Refining Co.* v. *Commissioner of Internal Revenue*, 348 U. S. 911, argued October 18, 1955, which will be controlled by the definition of "security", whether it is not of public importance for this Court to decide a justiciable controversy involving the definition of "security" as an "instrument commonly known as a 'security' ", such definition limiting the jurisdictional scope of the Securities Act of 1933, the Securities Exchange Act of 1934, the National Stolen Property Act and that part of the Internal Revenue Code dealing with the taxation of operations involving "securities".

Argument

I. This Court reaches constitutional issues last, not first. For this reason, no constitutional claims were incorporated in the petition for certiorari. The denial of certiorari results in your petitioner being denied **Due Process of Law as guaranteed by the Fifth Amendment to the Constitution of the United States.** Certiorari is not denied from an appellate decision on the merits. It is being denied from an adverse appellate decision on a motion to dismiss for want of jurisdiction.

The Commission's failure to adjudicate an order upon a statutory complaint constitutes denial of Due Process, is not "harmless error" and should not be countenanced by the courts, *Philadelphia Co.* v. *S.E.C.*, 175 F. 2d 808, *vacated as moot* on the joint motion of the parties, 337 U. S. 901.

Denial of appellate review of the Commission's "failure to act" or "denial of agency action", §2(g) of the Procedure Act, doubles this denial of Due Process.

Denial of certiorari on rehearing would amount to an evasion of your petitioner's constitutional right to Due

Process of Law, *i.e.*, to appellate review on the merits of a Commission decision. Your petitioner is being penalized for having instinctively, if unknowingly, adhered to the doctrine of primary jurisdiction and administrative finality so carefully expounded by this Court in *Far Eastern Conference* v. *United States*, 342 U. S. 570. That case was brought to this Court "because there were in issue important questions regarding the relation between the Sherman Law and the Shipping Act", *id.* at 572.

The petition for certiorari also presents, and the instant petition for rehearing hereby reaffirms, that there is here in issue the relation between the jurisdictional scope of the Securities Act of 1933 and the National Stolen Property Act. Further still, there is in issue the relation between the jurisdictional scope of the Securities Act of 1933 and that of the Edge Act, §25(a) of the Federal Reserve Act, 12 U.S.C. §§611-631, and §25(b) of the Federal Reserve Act, 12 U.S.C. §632 (see IV below). Such issues of public importance are not presented solely for your petitioner's benefit. Your petitioner happens to have presented a justiciable controversy involving them. That is attested to by the fact that the amount in controversy (which is not in issue here) is much smaller than the costs of this litigation. For your petitioner the issue is one of principle, not of personal profit.

Denial of certiorari becomes a denial of Due Process of Law when the grounds therefor, which are not apparent from the Court's order, appear to be in conflict with the basis for the grant of the writ in other cases. In several of its recent opinions, this Court has given its reasons for the grant of the writ: "Serious questions concerning the administration of the Railway Labor Act are in issue", *Whitehouse* v. *Illinois Central R. R. Co.*, 349 U. S. 366, 370; "public significance of the issues", *F.P.C.* v. *Oregon*, 349 U. S. 435, 441; "importance of (appellate) decision to

the administration of the (Federal Communications) Act", *F.C.C.* v. *Allentown Broadcasting Co.*, 349 U. S. 358, 360. Identical reasons militate for a grant of the writ in the instant case. But the Court's order seems to have issued after consideration of respondent's untimely Brief in Opposition to the petition for certiorari. For that reason, and without admitting that such brief was receivable under Rule 24(1), respondent's objections to the denial of the writ may be dealt with.

There is *conflict of decisions* within the Court of Appeals as to appellate jurisdiction to review a Commission decision not adjudicated on a record. In *Philadelphia Co.* v. *S.E.C.*, 164 F. 2d 889, *certiorari denied*, 333 U. S. 828, Circuit Judges STEPHENS, CLARK and WILBUR K. MILLER, were presented with the Commission's motion to dismiss, for lack of jurisdiction, Philadelphia's petition to review a Commission "order". The essentials of that case correspond to the case at bar: the Commission asserted that it had "discretion" to revoke an exemption under the Public Utility Holding Company Act of 1935 otherwise than by order made upon a record developed in public hearings. It reserved this position by certifying as the "record" in the case the "public file" which it had maintained in connection with its revocation of Philadelphia's exemption. The learned judges denied the motion, holding that Philadelphia had complied with the doctrine of primary jurisdiction and administrative finality. After certiorari was denied by this Court, the same judges could not avoid reaching constitutional questions in refusing to review on the merits the Commission's revocation of Philadelphia's exemption on the ground that such decision had been reached in violation of Due Process of Law, *Philadelphia Co.* v. *S.E.C.*, 175 F. 2d 808, on joint motion of the parties, *vacated as moot*, 337 U. S. 901.

In the case at bar, Circuit Judges EDGERTON, BAZELON and FAHY, dismissed upon motion for lack of jurisdiction, a petition for appellate review of a Commission "order" or "rule". "The particular label placed upon (its action) by the Commission is not necessarily conclusive, for it is the substance of what the Commission has purported to do and has done which is decisive", *Columbia Broadcasting System* v. *U. S.*, 316 U. S. 407, 416.

Here too, the Commission contended that it had "discretion" to enter its disposition of a statutory complaint without adjudicating an "order" on the basis of a "record". Therefore, its argument continues, there being no "record", no reviewable "order" exists. The learned judges tacitly disagreed with their brethren within the Circuit and granted the motion. They formulated a new concept of judically reviewable "orders" under §9(a) of the Securities Act, some that are deemed to be reviewable, and others which are not, presumably "discretionary" orders. Their error is basically simple: (i) §9(a) subjects all Commission "orders" to exclusive appellate review upon the petition of any aggrieved person, hence no such orders are exempt from such review; (ii) even if an "order" were discretionary under §20(a) as dispositive of a complaint, such "order" is not exempt from appellate review by reason of §10 of the Procedure Act because the Securities Act does not preclude judicial review. The only "agency action committed by law to agency discretion" is the Commission's power to decide upon an investigation, not its duty to entertain a statutory complaint. As much is apparent from §22 of the Shipping Act, 46 U.S.C. §821, §208 of the Communications Act, 47 U.S.C. §208, §1002 of the Civil Aeronautics Act, 49 U.S.C. §642(a).

§20(a) of the Securities Act, in issue here, has the same purpose as these other statutes, that is, to confer upon the

Commission the duty to entertain complaints alleging violations of the Act and, subsequent to the adjudication of orders dispositive of such complaints, to confer discretion upon the Commission whether to investigate the matters complained of.

This doctrine of primary jurisdiction and administrative finality has been carefully expounded in *Far Eastern Conference, supra,* In view of the Court of Appeals' hypothetical opinion, a denial of certiorari would cast considerable doubt as to the applicability of the doctrine to proceedings before the Commission, the latter having committed the type of error recognized by this Court in *Montana Dakota Co.* v. *Public Service Commission,* 341 U. S. 246, 249: "As frequently happens where jurisdiction depends on the subject matter, the question whether jurisdiction exists has been confused with the question whether the complaint states a cause of action".

The Commission has exclusive primary jurisdiction, upon a §20(a) complaint, to decide whether the alleged violations of the statute have been committed. In this respect, the Commission's decision must be correct as a matter of law before it may proceed to the discretionary stage whether to institute an investigation. Reliance upon *Crooker* v. *S.E.C.,* 161 F. 2d 944 (1947), not decided on the basis of the Procedure Act, is misleading. There, the Commission's power to accelerate the effectiveness of a registration statement was in dispute. The Commission had complied with the doctrine of primary jurisdiction and administrative finality by granting the Federal license (*i.e.* accelerating the effectiveness of the registration statement, a "license" under §2(e) of the Procedure Act). The security holder had a cause of action under §11(a) to challenge the terms of that license.

In the case at bar, the issuer sells his securities through the mails and through the use of the instrumentalities of

interstate commerce *without* a Federal license. Therefore, the security holder, *i.e.* your petitioner, cannot assert a cause of action against him. The paradox appears that whereas an issuer in compliance with the Act's licensing requirement is amenable to suit by the security holder, an issuer in violation of such requirement escapes amenability to suit. Violations of the Act may be complained of by means of a §20(a) complaint. Such complaint invokes and complies with the doctrine of primary jurisdiction and administrative finality. Where, as here, the Commission denies the applicability of this doctrine to proceedings before it, appellate review is the corrective remedy: "Generally, judicial review of administrative orders is limited to determining whether errors of law have been committed and the court of review exhausts its power when it lays bare a misconception of law and compels correction", *Scripps Howard Radio* v. *F.C.C.*, 316 U. S. 4, 10, *F.P.C.* v. *Idaho Power Co.*, 344 U. S. 17, 20.

II. Article II, §3 of the Constitution of the United States includes among the President's duties: "**He shall take care that the laws be faithfully executed**". However, pursuant to §4(d) of the Securities Exchange Act of 1934, 15 U.S.C. §78d(a), Congress established the Commission and provided for the President to appoint its members by and with the advice and consent of the Senate. Therefore, the duty of "faithfully executing" the securities laws devolves upon the Commission, under the President's overall "care".

"Faithful execution of the laws" means "implementing the statute either by general rule or by individual decisions", *F.C.C.* v. *American Broadcasting Co.*", 347 U. S. 284, 289, otherwise "the Commission would we remiss in its duties if it failed to exercise its licensing authority" for that purpose, *id.*

It gives your petitioner no pleasure to state that the Commission is remiss in its duties because it has failed to implement §20(a) either by General Rule or by an individual decision reached by the full Commission. As a result of the decision of its then Assistant Director, Division of Corporation Finance and with respect to the scope of its duties, the Commission has confined itself to a bondage of error from which only this Court can extricate it. The statutory mandate to the Commission for the "faithful execution of the laws" is §19(a) of the Securities Act, the counterpart of §303(r) of the Communications Act, cited by this Court in support of its opinion in *American Broadcasting Co., supra.* But §20(a) is not a model of draftsmanship, hence the Commission had the choice of three statutory patterns for the formulation of a Rule thereunder, §22 of the Shipping Act, §208 of the Communications Act and §1002 of the Aeronautics Act. "The relation of remedy to policy is peculiarly for the administrative agency", *General Protective Committee* v. *S.E.C.*, 346 U. S. 521, 534.

In the final analysis, the constitutional requirement of "faithful execution of the laws" is alleged to have been satisfied by the Commission's then Assistant Director, who signed the decision of July 8, 1954 on behalf of the Commission and by virtue of its own regulations. Your petitioner challenges this procedure as not meeting the constitutional requirement, since the Assistant Director is not appointed by and with the advice and consent of the Senate and he does not statutorily act for the Commission. By virtue of Reorganization Plan #10 of 1950, 64 Stat. 1265, only the Commission's Chairman may perform its executive and administrative, but not adjudicatory, functions. "Since the Commission professed to dispose of the case merely upon its view of a principle which it derived from the statute and did not base its conclusion on matters

within its own special competence, it is for (this Court) to determine what the governing principle is", *F.C.C.* v. *R.C.A. Communications, Inc.*, 346 U. S. 86, 91. "Faithful execution" of the securities laws requires the Commission to correctly define the meaning of "security" so as not to evade the jurisdictional scope of the Securities Act.

"The interpretation of the meaning of statutes as applied to justiciable controversies is *exclusively* a judicial function. This duty requires one body of public servants, the judges, to construe the meaning what another body, the legislators, said", *U.S.* v. *American Trucking Association*, 310 U. S. 534, 544. The Court of Appeals trespassed against these basic principles of appellate review, including those of *Scripps Howard Radio, supra,* and left standing, for alleged want of jurisdiction, a Commission decision which emasculates the meaning of an entire subsection of the Securities Act. "The cardinal principle of statutory interpretation is to save, not to destroy * * * It is our duty to give effect, if possible, to *every clause and word* of a statute, rather than emasculate an entire section as the Government's interpretation requires", *U. S.* v. *Menasche*, 348 U. S. 528, 538. If the Court of Appeals' ambiguous and hypothetical decision is left standing, the faithful execution of the securities laws will become a matter for the caprice and arbitrariness of the Commission's Assistant Directors. The violators of the securities laws will feel safe because under the Commission's practice no complaints need be entertained by it and no judicial review can be had of its failure to act. If such violators operate from a judicial district where it takes from 19 to 54 months to bring a civil action to trial (assuming that it is possible to assert a cause of action under the Act), they can feel safe from the effects of delayed justice. The plaintiffs' right to substantive justice will be defeated by the defendants' right to procedural justice. In such circumstances, the "faithful execution of the laws" becomes a myth.

III. Since the Court's order of October 10, 1955 does not note the untimely filing of the Commission's Brief in Opposition to the petition for certiorari, it must be assumed that the Court considered such brief over your petitioner's timely objection to its admissibility. The rule is settled that Federal agencies must comply with this Court's rules just as any other litigant, *F.T.C.* v. *Minneapolis Honeywell Co.*, 344 U. S. 208. In the case at bar, the Commission acknowledged receipt of the petition for certiorari on May 11, 1955. Its Brief in Opposition was not filed until forty days later, on June 20, 1955. Therefore, such brief was not properly before the Court and was improvidently considered by it.

Nevertheless, because of such apparent consideration, it is necessary to deal with the Commission's position. Since the Administrative Procedure Act of June 11, 1946 is applicable to proceedings before the Commission and is mutually complementary with the Securities Act, cases decided prior to its enactment no longer control a case decided under its provisions. The case at bar is of post-Procedure Act "vintage", *Mitchell* v. *Vollmer & Co.*, 349 U. S. 427, 429. It cannot be controlled by cases of pre-Procedure Act vintage such as *Louisiana* v. *McAdoo*, 234 U. S. 627 (1914) and *F.P.C.* v. *Metropolitan Edison Co.*, 304 U. S. 375 (1938), which obviously do not incorporate the philosophy of that Act. The only cases of post-Procedure Act vintage mentioned by the Commission are those under the Labor Management Relations Act of 1947, 29 U.S.C. §151ff. Under Labor Act procedure, a *complaint* may be issued by the Board, its agent or agency, for consideration and investigation by the Board itself. The Board is the complainant and the same Board issues its *order* dispositive of the complaint. The Court is respectfully urged to take judicial notice of the fact that under this procedure, as well as under the Federal Trade

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Commission Act, 15 U.S.C. §46, *complaints* are issued by the administrative agency and disposed of by *order*, which are judicially reviewable.

On the other hand, §20(a) of the Securities Act provides for "such person" as has acquired any security to file a complaint with the Commission alleging violations of the Act. The statute must be interpreted by reference to §22 of the Shipping Act, so carefully expounded in *Far Eastern Conference, supra.*

Ironically, the purpose attributed by the Commission to the statute, *i.e.* the regulation of "investment" securities, is a test fully met by the issuer here, assuming, *arguendo*, that the Act's preamble does not exclusively state its purposes. The issuer's purpose in gathering the public's money deposits through the sale of travelers checks in interstate commerce is to create a revolving fund for use as an investment medium. In recent years, 92% of such investments are represented by the counterpart of outstanding travelers checks and letters of credit (both having a maturity at the time of their issuance of more than nine months), as shown by the following figures from the issuer's balance sheets.

r ending ember 31	Total assets or liabilities	Liability for travelers checks and letters of credit sold	Investments	Percentage investments to travelers checks liability
1.....	$252,701,865	$211,424,112	$186,941,130	83
2.....	279,569,518	236,850,134	218,295,464	92
3.....	288,750,545	246,492,781	227,308,961	92
4.....	303,023,634	259,636,599	240,075,390	92

Thus, the issuer's tremendous national advertising campaign is aimed at securing enough funds from the Peters in order to pay off the Pauls. As shown by the "growth" of the outstanding amount of travelers checks, the Pauls are somewhat slow in claiming their

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interest-free and uninsured deposits. Therefore, the issuer is free to "invest" their money, although not under the Commission's supervision pursuant to the Investment Company Act of 1940, 15 U.S.C. §80a. Yet experienced (and fully supervised) institutional investors can make serious errors of judgment resulting in a money loss to the institution concerned. The following figures reflect the errors of judgment of two of the country's most experienced institutional investors, both members of the Federal Reserve System and of the Federal Deposit Insurance Corporation (the issuer here complained of is a member of neither).

	Profit (Cr.) or Loss (Dr.) from security transactions first nine months of year	
	1954	1955
First National City Bank of New York	$7,845,561 Cr.	$1,515,384 Dr.
The Chase Manhattan Bank	7,502,000 Cr.	1,007,000 Dr.

The Commission's error in not setting up a "record" to include these facts otherwise publicly known is leading it into further error as to its responsibilities under the Investment Companies Act of 1940. Such errors should be corrected by this Court on certiorari or by the Court of Appeals on remand, since "consistent error is still error", *Phillips Petroleum Company* v. *Wisconsin*, 347 U. S. 672, 678, Note 5.

IV. Since September 6, 1955, a petition for the issuance of a Rule under §25(a) of the Federal Reserve Act, pursuant to §4(d) of the Administrative Procedure Act, has been brought by your petitioner before the Board of Governors of the Federal Reserve System. The Board's preliminary interpretation of that statute, issued September 27, 1955, appears to be that corporations engaging, or

wishing to engage, in the foreign banking business, may optionally in their discretion seek the Board's permit for that purpose. This absolves such corporations from (i) the organization or conversion requirement of that Act, (ii) the requirement of seeking the Board's specific consent for the gathering of money deposits within the United States, *i.e.* their sales of travelers checks, and (iii) their amenability to suit in a Federal court "notwithstanding any other provision of law" under §25(b), as to transactions arising out of their foreign banking business.

Once more, the failure of an administrative agency to exercise its licensing authority for the purpose of implementing a statute committed to its administration deprives your petitioner of a cause of action for the recovery of his property and also deprives Federal district courts of their *original* jurisdiction under §25(b), American Express Company, an institution extensively engaged in the foreign banking business, having ignored the requirement of securing a Federal license for that purpose.

Were the Board to adopt the draft Rule submitted as part of the statutory petition, the case at bar would become moot, since such Rule would license the issuer only upon condition of its being exempt under the Securities Act and under the Investment Companies Act, and upon the further condition that it assume liability for all its unpaid obligations. For this reason, it is hereby prayed that a stay of proceedings be granted pending decision by the Board.

Were the Board to deny the relief sought, the Board's "agency action" would be subject to judicial review, since §25(a) neither precludes such review nor commits to "agency discretion" the licensing requirement. No exclusive appellate review of the Board's forthcoming "agency action" is prescribed by any statute known to your petitioner. Therefore, this Court may be petitioned for the

issuance of a writ under 28 U.S.C. §1651(a), (the jurisdictional basis for the decision in *Far Eastern Conference, supra*), since the matter is one of public importance and the doctrine of primary jurisdiction and administrative finality has been complied with by your petitioner.

Should an extraordinary writ be granted, the two cases should be consolidated for argument, since they are closely interrelated.

It is hereby certified that this petition conforms to the requirements of Rule 58(2).

Respectfully submitted,

WILLIAM LEIGHTON,
Petitioner *pro se.*